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In The

Supreme Court of the United States

October Term, 1990

GULF STATES UTILITIES COMPANY,

Petitioner,

v.

COALITION OF CITIES FOR AFFORDABLE UTILITY RATES, OFFICE OF PUBLIC UTILITY COUNSEL CITY OF BRIDGE CITY, *et al.*, and PUBLIC UTILITY COMMISSION OF TEXAS,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Texas

JOINT BRIEF IN OPPOSITION OF RESPONDENTS COALITION OF CITIES FOR AFFORDABLE UTILITY RATES AND OFFICE OF PUBLIC UTILITY COUNSEL

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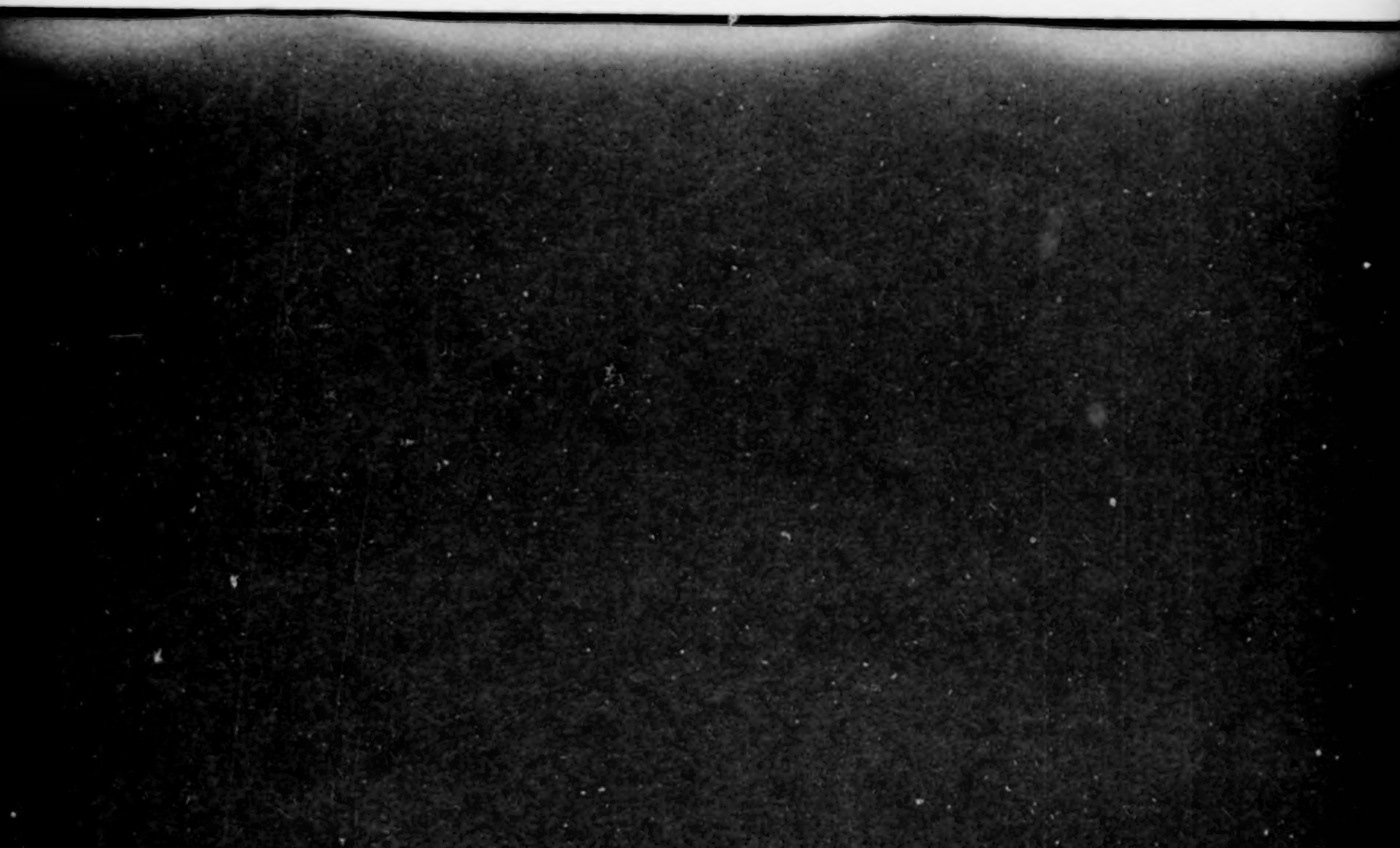

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JOINT BRIEF IN OPPOSITION OF RESPONDENTS COALITION OF CITIES FOR AFFORDABLE UTILITY RATES AND OFFICE OF PUBLIC UTILITY COUNSEL

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondents, Coalition of Cities for Affordable Utility Rates (Cities of Conroe, Cut n'Shoot, Panorama Village, Huntsville, Somerville, West Orange and Willis) and the Office of Public Utility Counsel, an agency of the State of Texas, respectfully request that this Court deny the petition for writ of certiorari of Gulf States Utilities

Company seeking review of the opinion of the Supreme Court of Texas reported at 798 S.W.2d 560 (Tex. 1990).

The Coalition of Cities for Affordable Utility Rates is comprised of seven cities in GSU's service territory which exercise original jurisdiction over GSU's rates. The Coalition cities participated as parties in Docket No. 7195, and the Coalition brought the district court suit to enjoin relitigation of the River Bend prudence issue in a subsequent PUC docket. The Office of Public Utility Counsel is an agency of the State of Texas charged with the responsibility of representing Texas residential and small business consumers of electricity in PUC litigation matters.

I. STATEMENT OF THE CASE

Respondent Coalition brought suit in the Travis County District Court to prevent another long and costly round of litigation in the Public Utility Commission ("PUC" or "Commission") over the prudence of the cost to construct River Bend Nuclear Generating Station. Even though this issue had been exhaustively litigated already in Commission Docket Nos. 7195 and 6755 ("Docket No. 7195") at enormous expense, and the results are presently being appealed to the district court by Gulf States Utilities Company ("GSU"), relitigation of the prudence issue in a new Commission docket was sought by GSU.

The PUC had issued its Final Order in Docket No. 7195 on May 16, 1988. The prudence of the cost to construct River Bend Nuclear Power Plant had been vigorously litigated in Commission Docket No. 7195. GSU spent more than $10 million in litigation costs before the Commission. The hearings took 132 days, of which 101 days were devoted to the River Bend prudence inquiry.[1]

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[1] GSU in one of its PUC pleadings after the PUC trial described the proceedings as follows:

(Continued on following page)

The total capital cost of the plant was approximately $4.5 billion. GSU, in its Petition to Increase Rates, asked that all the costs of construction be declared prudently incurred. The Commission found that GSU, which had the burden of proof on the prudence issue, had proved only $2.273 billion of its River Bend expenditure to have been prudently incurred. The Commission determined that GSU failed to meet its burden to prove the prudence of the plant cost in excess of that amount ($1.453 billion).

GSU filed its original petition to the Travis County District Court appealing the Commission's Final Order in Docket No. 7195. The appeal of GSU became part of Cause No. 447,502, the consolidated administrative appeals of Docket No. 7195. GSU asked the district court to reverse and render with regard to the costs expended in excess of the $2.273 billion found prudently incurred, requesting the court to hold that GSU had proved that all of its expenditure to construct River Bend was prudently incurred. The primary issue in GSU's appeal is what amount of the $4.5 billion total plant cost was shown to be prudently incurred. The appeal is now pending in state district court.

While its appeal to the district court was pending, GSU secured a new docket at the Commission, Docket No. 8702, to again litigate the prudence of the cost in excess of $2.273 billion. GSU sought to achieve its ultimate goal of inclusion of all its expenditures to construct River Bend by attacking one Commission order in

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(Continued from previous page)

The record in this proceeding is enormous. In 132 hearing days, over one hundred witnesses appeared. Their prepared testimony covered over a thousand pages and their cross-examination many, many thousands more. Thousands more pages of exhibits were received in evidence. Every factual, legal and policy issue was thoroughly explored and canvassed. GSU Replies to Exceptions to Examiners Rpt. at I-1.

the district court, while simultaneously suing for renewed consideration and rate inclusion of the same plant costs in a new docket at the Commission. Thus, GSU did not feel limited to the substantial evidence review of the Final Order issued in Docket No. 7195 available under the Texas APA ("APTRA"),[2] as were the ratepayers, but also sought a retrial for the amount it had failed to prove prudent.

The Coalition filed suit in the District Court of Travis County, Texas, for declaratory judgment and an injunction to prevent the relitigation of the prudence issue at the PUC. The trial on the merits in the injunction suit was heard on July 10, 1989. After hearing argument and objections, the trial court entered a final judgment which permanently enjoined the Commission from holding further hearings on or reconsidering the prudence of the cost to construct River Bend. The final judgment included findings and conclusions. No amended or additional findings or conclusions were requested by any party.

The Court of Appeals reversed, reasoning that in Docket No. 7195, the PUC performed a procedure analogous to a severance of the dollar amount as to which GSU had fallen short in meeting its burden of proof. The Texas Supreme Court rejected the Court of Appeals' analysis, observing that GSU was not entitled to a second trial to save itself from having failed to meet its burden of proof.[3] *Coalition v. PUC*, 798 S.W.2d at 564. The Texas Supreme Court affirmed the trial court's judgment, holding, in agreement with the trial court, that the Texas Public Utility Regulatory Act ("PURA"),[4] did not authorize such relitigation as was sought by GSU.

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[2] Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a § 19.

[3] The Texas Supreme Court also observed that nothing in PURA or the Texas APA allows a division of the investment rate base in ratemaking proceedings. 798 S.W.2d at 564-65.

[4] TEX. REV. CIV. STAT. ANN. art. 1446(c).

The Texas Supreme Court specifically held that the PUC had no statutory authority to allow GSU to relitigate the same historical prudence facts in a new case for the purpose of curing GSU's failure in its burden of proof in Docket No. 7195. GSU then filed a motion for rehearing in the Texas Supreme Court, lacing for the first time its relitigation arguments with the words "constitution" and "fourteenth amendment." Respondents pointed out to the Texas Supreme Court that it was impermissible under Texas law for GSU to raise its federal questions for the first time on motion for rehearing. The Texas Supreme Court overruled GSU's motion for rehearing without opinion.

II. THIS COURT LACKS JURISDICTION OVER GSU'S PETITION

A. GSU's Federal Questions Were Not Expressly Passed On By The Texas Courts

In order for a state court case to be reviewed in this Court, it must appear from the record that a federal question was decided by the highest state court. *Cardinale v. State of Louisiana*, 394 U.S. 437, 438 (1969); *California v. Holladay*, 159 U.S. 415 (1895). In this case the Texas Supreme Court, delivered its opinion as reported at 798 S.W.2d 560, did not expressly decide the questions here raised of the alleged federal unconstitutionality of the trial court's injunction against relitigation. Nor did the trial court or the Texas Court of Appeals address any such questions.

The Texas courts could not address the constitutional questions now brought to this Court because they were either never brought forward at all with any precision, or were not brought forward until GSU's motion for rehearing in the Texas Supreme Court, and thus were not brought in a timely and proper manner under Texas procedural law. Since GSU's federal constitutional questions were not ruled upon by any state court, they are not

properly before this Court and this Court has no jurisdiction under 28 U.S.C. § 1257 to consider them. *Cardinale v. State of Louisiana*, 394 U.S. at 438.

B. The Federal Questions Now Brought By GSU Were Not Timely Or Properly Raised

This Court has held that if the state court fails to pass expressly upon the federal question(s), it will be presumed that the federal question was not properly presented in the state court, unless the complaining party can affirmatively show to the contrary. *Street v. State of New York*, 394 U.S. 576, 582 (1969); *see also* U.S. Sup. Ct. Rule 14.1(h). Since the Texas Supreme Court did not expressly pass on the alleged federal questions, there exists a presumption that these questions were not properly presented to that court by having been preserved in the appellate process. *Street*, 394 U.S. at 582. Although GSU has made an attempt at the required affirmative showing of timely and proper presentation for some of its questions, its showing is so grossly inadequate that it only serves to demonstrate GSU's failure to timely and properly raise its federal questions.

GSU's first two questions presented involve the due process clause of the fourteenth amendment to the United States Constitution as it may relate to this Court's opinion in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966). To establish jurisdiction of this Court under 28 U.S.C. § 1257(a), GSU was required in the state courts to have "specifically set up or claimed under the Constitution . . . of . . . the United States" that right which it now seeks to have this Court enforce. *Webb v. Webb*, 451 U.S. 493, 495 (1981); 28 U.S.C. § 1257(a).

Texas law requires that in order to preserve error as to a trial court judgment, the points must be briefed to the Court of Appeals. *Lout v. Whitehead*, 415 S.W.2d 403, 407 (Tex. 1967); *American General Fire and Casualty Company v. Weinberg*, 639 S.W.2d 688 (Tex. 1982). However,

GSU did not raise its constitutional law contentions relating to *Utah Construction* in its brief to the Court of Appeals appealing the final judgment of the trial court. GSU makes an attempt to affirmatively show in its petition appendix K[5] that it had set up its constitutional questions in the Court of Appeals, by including a passage of its appellant's brief to the Court of Appeals. This passage merely contains a citation and a quote from *Utah Construction* for the proposition that courts have not hesitated to apply *res judicata* where disputed issues of fact properly before an administrative agency were resolved. In its appellant's brief, GSU had included the citation and quote from *Utah Construction* under a point of error which simply alleged that the trial court erred in applying *res judicata* to preclude further River Bend prudence litigation. There was absolutely nothing in GSU's point of error or brief under that point to alert the Texas courts that GSU was calling upon them to decide a question based upon the U.S. Constitution. The words "due process," "fourteenth amendment" and "Constitution" appear nowhere in connection with GSU's supposed setting up of its constitutional questions at the required stages in the Texas courts.[6] These Respondents could find no case, even with regard to a *pro se* petitioner, which

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[5] GSU Appendix at 304a.

[6] *Compare Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 78 (1988) in which a pleading that did not identify a grievance as a constitutional matter either by clause or by amendment was held inadequate to raise a federal question for jurisdictional purposes. This Court observed that "[a]t a minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the State law." *Bankers Life* at 77-78, quoting *Webb v. Webb*, 451 U.S. at 501.

permits as generous an inferring of a constitutional claim as that which GSU relies upon here.[7]

Neither can it be presumed that an inspection of *Utah Construction* would lead the Texas courts to believe that GSU was, albeit elliptically, attempting to raise a U.S. Constitutional defect in the trial court's judgment. In *Utah Construction*, this Court made no reference to the U.S. Constitution in its *res judicata* and collateral estoppel discussion, and did not manifestly appear to reach any constitutional question in discussing *res judicata* and collateral estoppel. Rather the Court's decision appears to be grounded upon principles of federal administrative law and specifically, an agreement between the parties as modified by the federal Wunderlich Act.[8] *Utah Construction*, 384 U.S. at 421. Thus the Texas Court of Appeals was not alerted to and did not have the opportunity to consider or decide any U.S. Constitutional question regarding *Utah Construction*, and consequently, the Texas

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[7] In Texas, opinions of this Court are given great weight in guiding the Texas courts to resolve matters of state common law, but a mere citation to a case of this Court does not *ipso facto* raise a question of federal law, unless it has properly been articulated as such with a fair precision.

A simple reference to a federal case in a brief is insufficient to inform a state court that it has been presented with a claim subject to this Court's jurisdiction under 28 U.S.C. § 1257. *See Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 535, 550 n.9 (1987).

[8] Does GSU assume, without ever having been so nice as to say so, that *Utah Construction* was specifically decided under the due process clause of the Fifth Amendment? Rather than discussing *res judicata* and collateral estoppel in federal constitutional terms, this Court had simply noted that the result reached in *Utah Construction* was "harmonious with general principles of collateral estoppel." 384 U.S. at 421. This Court's holding was thus not even squarely based upon those principles.

Supreme Court had no Texas court ruling on U.S. Constitutional law to review.

Texas procedural law also requires that an allegation of unconstitutionality be brought to the attention of the trial court for consideration so that the parties may join issue on that matter. *Babcock v. State*, 668 S.W.2d 857, 861, and 861 n.4 (Tex. App. – Austin 1984, writ ref'd n.r.e.); *see Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982); *PGP Gas Products, Inc. v. Fariss*, 620 S.W.2d 559, 560 (Tex. 1981); Tex. R. App. P. 52.[9] In an attempt to make the required affirmative showing of timely and proper presentation to sustain the jurisdiction of this court, GSU offers its appendix L,[10] which consists of a passage from a trial court brief on *res judicata*. This passage merely contains a citation *"See United States v. Utah Construction & Mining Co., . . ."* following the proposition that there must be an actual resolution of disputed facts after adequate opportunity for litigation.[11]

For the same reasons discussed above with regard to GSU's failure to properly and timely bring error on appeal, GSU's citation to *Utah Construction* in a trial court brief was woefully inadequate to articulate, raise and preserve a question with regard to the U.S. Constitution. Additionally, the trial court record reflects that when the hearing was held before the trial court on the injunction,

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[9] "Thus, predicates for complaints on appeal must be preserved at the trial court level by motion, exception, objection, plea in abatement, or some other vehicle. The complaint must identify the objectionable matter or event sufficiently for the opposite party to cure any deficiency and for the trial judge to know the nature of the alleged error. Tex. R. Civ. Pro. 373." (now Tex. R. App. P. 52). *PGP Gas Products*, 620 S.W.2d at 560.

[10] GSU Appendix at 306a.

[11] GSU's brief to the Texas Supreme Court similarly did not raise the federal questions here presented. *See GSU* Appendix J, GSU Appendix at 302a.

GSU conspicuously failed to raise any of the constitutional questions it now seeks to have this Court entertain. Conclusions of Law regarding constitutionality did not appear in the judgment of the trial court. No additional conclusions of law relating to GSU's constitutional rights were requested of the trial court by GSU, which GSU might have requested to preserve any of its lately devised federal constitutional questions.

GSU is particularly shameless in its attempt to offer its citation of *Utah Construction* in its trial and appellate briefs as its affirmative showing of proper presentation with regard to its question 2(b) on an "altered standard." Aside from the fact that GSU's contention of an "altered standard" is a GSU fabrication, there is nothing GSU has shown in its petition or appendix by which it properly and timely preserved this constitutional contention for review by the Texas Supreme Court and this Court. GSU's citation or quote from *Utah Construction*, barely briefed or explained, (GSU Appendices K and L) could not serve to preserve for review a constitutional question of an "altered standard" in the manner required by Texas law. *See Pirtle v. Gregory*, 629 S.W.2d at 920; *PGP Gas Products, Inc. v. Fariss*, 620 S.W.2d at 559; *Lout v. Whitehead*, 415 S.W.2d at 407. GSU makes a transparent attempt to shoehorn its lately raised constitutional questions into its trial and appellate brief citations of *Utah Construction*. However, GSU's attempt does not rise to the level of the affirmative showing required under *Webb, Street* and this Court's other cases referred to herein.

This Court has held that a point raised for the first time on appeal is not properly presented where the state's procedural law requires issues to be first raised in the trial court in order to be considered on appeal. *Louisville & Nashville R.R. Co. v. Woodford*, 234 U.S. 46, 51 (1913). In this case, GSU not only did not squarely raise its constitutional contentions in the trial court as required by Texas law, but also failed to properly raise those contentions in any cognizable manner on appeal. Having

waived its constitutional questions by lack of timely and proper presentation below, the Texas Supreme Court was without jurisdiction to consider them. *See Pirtle v. Gregory*, 629 S.W.2d at 920; *Babcock v. State*, 668 S.W.2d at 861. GSU's constitutional questions regarding the fourteenth amendment as related to *Utah Construction* not having been properly or timely presented to or ruled upon by the Texas courts, they are not properly before this Court and this Court has no jurisdiction to consider them. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 671 (1976); *Cardinale v. State of Louisiana*, 394 U.S. at 438.

With regard to GSU's third question presented, concerning a constitutional balancing of investor and consumer interests, GSU has simply not made any affirmative showing at all that it properly and timely presented this question as a federal law matter to the trial and appellate courts as required under Texas procedural law.[12] *See Pirtle, PGP, Lout* and other cases cited above. The trial court did not rule on this question, nor did the Court of Appeals or the Texas Supreme Court. GSU makes a showing only that it raised this question in its motion for rehearing to the Texas Supreme Court. Yet raising this question for the first time on motion for rehearing in the Texas Supreme Court could not function to preserve the question for review by proper and timely presentation.[13] Thus, not having found any way to

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[12] As to all of its questions presented, GSU has not adequately complied with U.S. Sup. Ct. Rule 14.1(h) because it has not and cannot show that its federal questions were timely and properly raised in the state courts.

[13] In addition to the Texas law authorities heretofore cited, *see Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 137 U.S. 48, 53-54 (1890): "But it does not appear that either of these propositions was presented to the trial court in any way, or advanced in the supreme court, until urged in the petition for a rehearing. The title, right, privilege or immunity was not specially set up or

(Continued on following page)

identify this point with *Utah Construction*, GSU has not even been able to mount a facade of a complete affirmative showing that it properly and timely presented its third question to the Texas courts for review. As to its third point, GSU has patently failed to make the affirmative showing required under *Street* and *Webb, supra.*

Given its repeated failings to timely and properly articulate, preserve and present its constitutional questions, GSU should not be seriously heard to complain as it does in its petition that the Texas Supreme Court affirmed the judgment of the district court "without reference to Gulf States' federal rights."

C. This Case Does Not Present A Substantial Federal Question And Rests On An Adequate Non-Federal Basis

In order for this case to be within the jurisdiction of the Court it must present a real and substantial federal question. *New Orleans Waterworks Co. v. State of Louisiana*, 185 U.S. 336, 345-46 (1901); *United States Fidelity & Guar. Co. v. Oklahoma*, 250 U.S. 111, 112 (1919). The question decided in this case was whether, under Texas' PURA, GSU could obtain from the PUC a reexamination of an earlier factual determination regarding the prudence of a $4.5 billion expense. *Coalition of Cities v. PUC*, 798 S.W.2d at 564-65. The trial court which issued the injunction against reexamination, and the Texas Supreme Court in affirming the trial court's judgment, recognized that the

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claimed at the proper time and in the proper way . . . We are of the opinion that in Louisiana, as elsewhere, a title, right, privilege or immunity is not properly claimed, under the act of congress, when suggested for the first time in a petition for a rehearing after judgment." This holding is applicable to all of GSU's federal questions presented.

Texas legislature has not provided the PUC with authority to reexamine such a determination. Thus, by its petition, GSU makes an attempt to transmute a case squarely and properly decided on state law grounds into a series of questions which were not involved in this case.

Additionally, all of the questions presented to this Court by GSU are grounded in GSU's fictitious representation of the agency proceedings as not providing an entire or full prudence hearing under PURA. This representation differs radically from the description of the case provided by the Texas Supreme Court, and indeed, from the facts and law concerning the administrative record and final order. *See Coalition of Cities v. PUC*, 798 S.W.2d at 561-62. Thus, the questions presented by GSU are essentially fictive, rather than genuine and substantial, and do not even pass the threshold "reality" test of *New Orleans Waterworks, supra.*

Moreover, the issue of *res judicata* as applied to Texas administrative cases is a matter of Texas law, not federal law. *See Durley v. Mayo*, 351 U.S. 277, 284 (1956). In *Durley v. Mayo*, this Court ruled that the question of whether a Florida habeas petitioner might raise in the Florida courts matters precluded by Florida common law *res judicata* doctrine and statute was a matter of state law, and that the Supreme Court of Florida was not required to read non-existent statutory exceptions into the doctrine of *res judicata*. 351 U.S. at 284.[14] As in *Durley v. Mayo*, the application of *res judicata* in this case is a matter of state law. The injunction against relitigation and reexamination of the prudence issue was properly ordered and affirmed on the basis of state, rather than federal law.

As was held in a previous Texas case, *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 146 (Tex. App.

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[14] That holding is particularly significant here because of the Texas Supreme Court's analysis in *Coalition of Cities v. PUC* that there is no exception to *res judicata* under PURA for prudence determinations regarding historical investments.

– Austin 1986, writ ref'd n.r.e.), a Texas agency's attempted reservation of power to revisit and reconsider determinations incorporated in a final order is meaningless without a specific legislative delegation of such authority. *Coalition of Cities v. PUC*, 798 S.W.2d at 564. Thus, the state court judgment and Texas Supreme Court opinion is clearly based on a Texas state law ground and supported by prior state court opinions. *See United States Fidelity & Guar. Co. v. Oklahoma*, 250 U.S. at 112-13. This Court has held that it will not entertain jurisdiction over a case where the state court judgment is based on a non-federal ground. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1944). *See Stembridge v. State of Georgia*, 343 U.S. 541, 547 (1951).

Finally, even if any of GSU's questions presented could be said to pose a federal question in an abstract sense, they cannot be considered real questions in the context of this case, and therefore jurisdiction of this Court in this case does not exist. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902). Each of GSU's questions depends for its reality on a state law component, – that the PUC did not render a full decision under PURA.[15] GSU assumes in each of its questions that it did not obtain a full decision. However, this contention of GSU has been authoritatively decided as a matter of state law by the Texas Supreme Court in *Coalition of Cities v. PUC:* Where the PUC recognized that GSU had the burden of proof and determined that GSU had proved prudent a portion of its $4.5 billion expense, but had failed to prove prudent the remainder, this constituted a complete determination of the $4.5 billion under Texas' PURA. *Coalition of Cities v. PUC*, 780 S.W.2d at 563-64. Thus, each of GSU's questions depends on its non-federal law quarrel that the Texas Supreme Court misconstrued the PUC

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[15] Additionally, GSU's question 2(b) depends on the fiction that there was an altered standard of proof in Docket No. 7195.

Final Order as being a final and complete prudence determination.

The determination of the Texas Supreme Court as to what constitutes a complete decision to satisfy the factual determination requirements under PURA is a state law determination, and must be considered competent and conclusive by this Court as a matter of jurisdiction and comity. Thus, the remaining components of each of GSU's questions which attempt to raise constitutional issues are premised upon a GSU notion of incompleteness that is not the reality in this case. There is, therefore, no actual case or controversy which relates to GSU's questions presented.

D. The Texas Courts Have Not Yet Reviewed The Rates Set In Docket No. 7195

Because no review of rates set in Commission Docket No. 7195 has yet been made by the Texas courts, this Court has no jurisdiction to now undertake a review of the setting of rates in Docket No. 7195. Therefore this Court cannot undertake to consider GSU's question number three, which concerns a balancing of ratepayer and investor interests. It is unknown what the overall balance will be when Texas' judicial review process is allowed to run its course.[16]

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[16] Also noteworthy is that the sort of balancing discussed by *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) is an overall balancing which takes into account the whole case for a rate change. There were many issues in Docket No. 7195 besides River Bend prudence, and most of these are also the subject of appeals of the various parties which participated at the agency level. A prudence determination could not be "balanced" in isolation, so that the result of the entire administrative appeals, including the points regarding prudence, should be known before the "balance" can be scrutinized by the Texas Supreme Court or this Court.

Most of the parties to the Commission Docket No. 7195, including GSU, have brought administrative appeals to Docket No. 7195, which are now pending in the District Court of Travis County, Texas. These appeals all contend that the rates should be different than those which were set in the Final Order in Docket No. 7195. GSU contends that it proved that all of its River Bend expenditure of $4.5 billion was prudently incurred and if it prevails, this must impact on the determination of the rates. Under PURA and the Texas APA ("APTRA"),[17] the parties to Docket No. 7195 are entitled to substantial evidence review of the rates set in the final order of that administrative case.[18]

The rates set in Docket No. 7195, however, were *not* the subject of the injunction suit to prevent prudence relitigation, nor of the Supreme Court case for which writ of certiorari is now sought. The Texas Supreme Court has not yet acquired jurisdiction over the administrative appeals in which the rates will be reviewed. Therefore GSU's third "balancing" question could not have yet properly come before the highest court of the State of Texas competent to decide such a question. *See* 28 U.S.C. § 1257(a). This Court has no jurisdiction over such a question.

III. THE WRIT SHOULD BE DENIED ON THE BASIS OF COMITY

The case for which review is sought is one where a state supreme court has prevented a state agency from

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[17] TEX. REV. CIV. STAT. ANN. art. 6252-13a § 19.

[18] Texas follows the Restatement on Judgments § 13 and federal practice in that a judgment is considered final for purposes of *res judicata* and collateral estoppel despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo. *Scurlock Oil v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

undertaking an extraordinary relitigation procedure contrary to state law. The matter of a state judicial system supervising its own administrative procedures to conform to the state's regulatory law and to its traditional common law practice of enforcing repose is an important state interest.[19] The interest of the state in remedying its public utility agency's *ultra vires* behavior through the granting of equitable relief is likewise an important state interest.

Additionally, there is now pending in the Travis County District Court a review of the PUC Final Order which GSU complains about in its petition to this Court. The administrative appeal will provide further state resolution concerning that Final Order as it proceeds through the Texas courts.

Therefore, for the above-stated reasons, if this Court had jurisdiction to review this case (which it does not), it would be appropriate for this Court to acknowledge comity relating to the Texas Supreme Court and Texas judicial system in deciding whether to grant the discretionary writ. Comity was defined in *Younger v. Harris*, 401 U.S. 37 (1971), as follows:

> [T]he notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their separate institutions are left free to perform their separate functions in their separate ways.

401 U.S. at 44. "This court repeatedly has recognized that the States have important interests in administering certain aspects of their judicial systems . . . " *Texaco v. Pennzoil*, 481 U.S. 1, 12-13 (1987). The Texas courts have a

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[19] The analogous importance of the principle of enforcing repose to the federal judicial system is discussed in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401-02 (1981).

significant interest in seeing that Texas administrative practice conforms to the state law which governs it. This Court should therefore decline to issue the discretionary writ in recognition of the principle of comity.

IV. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO GRANT THE WRIT

This Court's Rule 10.1 poses as a prerequisite to the granting of a writ of certiorari, the existence of special and important reasons. None of the reasons posed in U.S. Sup. Ct. Rule 10.1(a), (b) or (c) are applicable in this case, because the review sought is that of a State Supreme Court decision which did not decide a federal question.

Additionally, this petition is, in essence, an instance of one utility company complaining because it did not receive a favorable ruling concerning the quality of its evidentiary presentation to show the prudence of expenditures. The state agency which adjudicated the facts attempted to help the utility cure its evidentiary failure by permitting the utility to relitigate the same facts in a new case. There was no authority under Texas law to do this. There is no reason to expect the agency to again attempt to exceed its authority in this fashion. The state regulatory statute, which admittedly does not create an exception to *res judicata* and collateral estoppel under these circumstances, is not under challenge. No injustice has been done because GSU was responsible for the quality of its own evidentiary presentation and it has the ability to appeal any adverse findings pursuant to APTRA, which in fact it has done.[20] There is nothing important therefore that this Court could accomplish in reviewing this case. There is no special or important reason for granting the writ.

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[20] The appeal is now pending in the District Court of Travis County, Texas.

To establish the importance of this case, GSU in essence argues that findings adverse to utility companies may affect investors' perceptions of regulatory risk. Improving the salability of investor owned utility securities, however, is not an important reason to justify the U.S. Supreme Court in taking on the role of guarantor of utility success in state administrative contested cases.

V. GSU's PETITION IS REPLETE WITH MISSTATEMENTS OF FACT AND OF LAW

A. GSU Refuses To Recognize That It Failed In Its Burden Of Proof

GSU's petition represents a flowering of a GSU mythology concerning the agency proceedings in Docket No. 7195. GSU has developed this mythology over these past years to rationalize as the fault of Texas government GSU's own failure to prove prudent all of its River Bend plant expenditures. The Texas Supreme Court, however, did not accept GSU's version of the facts and law relating to the administrative proceedings because GSU's version failed to comport with the realities of the administrative record and state regulatory law.

On page three of its petition GSU announces that the Texas Supreme Court reached its result even though the PUC "made no determination," as to the prudence of $1.45 billion in investment, and the PUC announced "specific new proof requirements." GSU continues to discuss these two notions in pages four through ten of its petition. GSU's expressed notions of "no determination" and "new proof requirements" constitute misstatements of fact and law, as is explained below.

B. In Docket No. 7195 There Was A Complete Determination Regarding The Whole Plant Costs

The PUC determined that GSU failed in its burden of proof as to the prudence of River Bend costs above $2.273

billion. Plant costs above that amount were excluded from plant in service "because of a lack of sufficient evidence." *Coalition v. PUC*, 798 S.W.2d at 563. The Texas Supreme Court opinion is clear that this was a factually and legally sufficient determination under PURA, since GSU had the burden of proof on prudence. *Id.* at 563-64. Throughout these proceedings, GSU denied that it had the burden of proof, and argued that it could rely on a presumption of prudence. However, the Hearings Examiners, Commissioners, the state statute (PURA) and prior Texas Court decisions based on PURA, all were clear in signalling to GSU that it had the burden of proof under PURA. GSU does not challenge the statute in its petition.

GSU's petition largely depends upon the fiction that something was left undecided in Commission Docket No. 7195. However, the whole prudence issue has been decided and there is nothing left for the Commission to decide. The Texas Supreme Court is clear that the Commission's determinations that GSU met its burden as to part of the investment, but failed as to the rest, constituted a complete decision on the entire prudence issue concerning the whole investment placed in issue. The Texas Supreme Court thus stated that the Commission's determination that GSU had not met its burden of proof as to the prudence of $1.45 billion in cost overruns constituted an effective disallowance of that amount under PURA. 798 S.W.2d at 564.

The prudence question presented to the Commission in Docket No. 7195 was how much of the total $4.5 billion in River Bend expenditures was prudently incurred. The Commission found that GSU was only able to prove that $2.273 was prudently incurred. Implicit in this finding is the finding that GSU failed to prove that costs in excess of $2.273 billion were prudently incurred. The issue was very much like a damages issue before a trial court: If the litigant only proves that ten dollars of a twenty dollar claim was awardable, that does not mean that the litigant

did not receive a decision on the other ten dollars. Moreover, the Commission made determinations that because of a lack of sufficient evidence, plant would be excluded, and that GSU had failed to show the amount in excess of $2.273 billion was prudently incurred. *Coalition v. PUC*, 798 S.W.2d at 563. Thus the whole plant costs were fully litigated and entirely decided.

GSU's contention before the Texas Supreme Court was that the issue was not fully decided because "imprudence" was not specifically determined by the PUC. However, since GSU had the burden of proof under PURA § 40, any amount not proved is effectively disallowed. *Coalition v. PUC*, 798 S.W.2d at 564. No one has to prove "imprudence." Obviously, it would make no sense for opposing parties to have the burden of proof on the same issue. The Supreme Court expressed these concepts by discussing the burden of proof under PURA § 40 and by reference to *Gerst v. Goldsbury*, 434 S.W.2d 665 (Tex. 1967). 798 S.W.2d at 563-64. Any finding of "imprudence," would have been gratuitous as not required by PURA.[21] GSU had the burden to prove its expenditures

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[21] At the January 18, 1988 Final Order Meeting the Commissioners discussed the River Bend cost overruns with GSU counsel as follows:

> COMMISSIONER GREYTOK: Mr. Avery, there are sections of the Examiners' Report that state clearly that they cannot give us any indication whatsoever as to what happened with the escalating cost of River Bend. And when we started out the other day, I made the comment to you right up front, so there would be no doubt in your mind as to where I was headed, that we are missing $2.3 billion as far as being able to account for it.
>
> MR. AVERY: Unreconciled; right.
>
> COMMISSIONER GREYTOK: Unreconciled, undocumented, unwhatever; it's not there.

(Continued on following page)

were prudent, and the Commission made a determination as to how much GSU had proved.

The Commission did not find GSU to have failed in its burden due to C.O.L. 10,[22] as GSU argues, but *because of inadequacies in GSU's case.* Thus, as the Supreme Court recognized, C.O.L. 10 was at most a device by which GSU might in a future proceeding save itself from its failure to present adequate evidence in Docket No. 7195. The Commission's Final Order was indeed a final and complete order as to prudence. C.O.L. 10 itself, which referred to a potential repeated prudence examination in a future proceeding, did not serve to make the prudence determination non-final or incomplete. There was nothing to prevent a more favorable finding to GSU except the inadequacy of GSU's case on the whole plant.

The determination of the Commission as to GSU's success and failure in meeting its burden in Docket No. 7195 had nothing to do with future proceedings. It is simply an impeachment of the Commissioners as finders of fact to argue, as GSU does, that the Commissioners

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(Continued from previous page)

MR. AVERY: But not found to be imprudent.

COMMISSIONER GREYTOK: Well, it depends on whose finding – you know, the way –

COMMISSIONER CAMPBELL: I don't have to find it imprudent. If you haven't proved it to be prudent and to have been incurred through efficient operation, Mr. Avery, it would seem to me that all I would have to do is convince one other Commissioner to adopt the statement of our expert that there is no evidence in the record in which the Commission can either make a finding of prudence or imprudence and all. As long as I adopt that statement, you have lost on the burden of proof.

Final Orders Meeting Tr. 780-81.

[22] PUC Conclusion of Law 10 asserted the PUC's authority to reexamine the prudence issue in a future case.

would have or could have found a different amount to have been prudent if the Commissioners had known that *res judicata* principles applied.[23] This impeachment is based solely on GSU's conjecture, which is outside of the record. The Commission fully weighed the evidence in Docket No. 7195 and found that GSU had only proved $2.273 billion of the whole plant expenditures to be prudent.

What GSU sought to achieve by River Bend relitigation was a new trial or decision at the agency level before a differently comprised Commission than the one which decided the issue of River Bend prudence in Commission

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[23] In Final Orders Meeting the Commissioners clearly explained to GSU that they were there to make adjudicative fact-findings on the basis of what was *proved* to them:

> COMMISSIONER GREYTOK: . . . . I am not about to say to the ratepayers in your service area that I'm going to give you $2.3 billion based on nothing. In this Examiner's Report, we have witnesses who clearly state that you cannot – that there is no documentation.

Final Orders Meeting Tr. at 787.

> COMMISSIONER CAMPBELL: Mr. Avery, you know, I said when I came on this Commission I was going to be fair to every utility, and I said if you make your case, you would get it and if you didn't make your case, you didn't get it, and that the company shouldn't look at me or any other member of this Commission, they had better look at the attorneys and witnesses that put on their case.
>
> Now, as far as I'm concerned, there are some very critical issues that haven't been proven up in this case. And I feel that under the law – and I'm a stickler on trying to apply the law – under the law, I have absolutely no right to give you anything you haven't proven by a preponderance of the evidence. . . .

Final Orders Meeting Tr. at 790.

Docket No. 7195. GSU thereby hoped to secure for itself an opportunity to escape the consequences of its own failure in its burden of proof in Docket No. 7195.

In its administrative appeal pending in state district court, GSU contends that it did prove the whole of its River Bend expenditures to be prudent.[24] GSU has brought points of error alleging that the PUC's prudence determination is not supported by substantial evidence in the record. However, GSU is apparently not pleased with the standard of review under the Texas APA (APTRA) which would properly apply to a discontented litigant which had failed in its burden of proof at the agency level. Under that standard, GSU would have the burden to show that the PUC's Order is not supported by substantial evidence. *Coalition of Cities v. PUC*, 798 S.W.2d at 560 n. 7. GSU would instead like to have a second opportunity for the Commission to decide a matter which has already been fully and finally decided after exhaustive multi-million dollar litigation.

C. In Docket No. 7195 There Was No Altered Standard Of Proof Nor A New Specific Proof Requirement After The Close Of Evidence

GSU characterizes the Commissioners' evaluation of GSU's evidentiary presentation in Docket No. 7195 as an altered standard of proof, and as requiring new specific types of proof. This characterization is a fiction. Throughout the proceedings in Docket No. 7195 there was only one standard of proof on prudence. Under PURA § 40, GSU had the burden of proof to show its expenditures placed in issue to be prudent by a preponderance of the evidence.

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[24] The GSU administrative appeal petition was part of the record in the case below.

It is true that the Commission disagreed with its Examiners as to the quality of GSU's evidentiary presentation. Neither the Hearings Examiners nor the Commissioners, however, ever gave GSU directions concerning what type of evidence to submit, nor was it their job to do so. GSU was on notice from the beginning that it would have to prove the entire plant expenditure which it had placed in issue to be prudent.

GSU alone was responsible for deciding what types of evidence it would put on to convince the Commissioners, as well as for the quality of that evidence. In a PUC proceeding such as Docket No. 7195, the Hearings Examiners received evidence, evaluate it and make a recommendation or "report" to the Commission. The Commissioners then consider written and oral argument about the report, reevaluate the evidence and make a decision.

In Docket No. 7195, the Commissioners did not agree with some of the Examiners' views of GSU's evidence. It is the *Commissioners*, however who have the responsibility as finders of fact, and it is always the job of the party with a burden of proof to convince the Commissioners. It is not at all uncommon for the Commissioners to disagree with the Examiners. But the Commission only makes *one* decision on a disputed issue which is incorporated into a Final Order. Upon appeal, the PUC's decision receives a thoroughgoing substantial evidence review in district court to see if the decision on the issue is supported by the evidence. It is the *Commissioners'* fact finding which is subject to judicial review under the substantial evidence test.

GSU attempts to transmute the Commissioners' disagreement with the Examiners on the probativeness of GSU's statistical evidence into an alteration in standard. The Commission, however, never told GSU that its type of evidence was the right or wrong type, or that it could not offer its method of analysis or any other type of

analysis as evidence for the Commission's full consideration. It is not the Commission's duty to guide a utility by the hand through a contested adjudicative hearing, informing it in advance which evidence or style or presentation will be the most convincing. Nor is such a relationship required by due process.

Because there was no alteration in standard, nor a change in what type of evidence would be admissible, it is inaccurate to represent that Docket No. 7195 comes under either of the cases of this Court cited by GSU.

In *One Lot Emerald v. United States*, 409 U.S. 232 (1972), cited by GSU, findings in a criminal trial were held not to be conclusive in a later civil trial, because of the differences in the burden of proof. The proceedings in Docket No. 7195 bear no resemblance to the cited case, which involved two proceedings of different natures, under different statutes. The "standard" in any prudence inquiry before the PUC is the same by statute: the utility must prove its investment expense prudent, before the PUC, by a preponderance of the evidence. PURA § 40. Furthermore, in the instant case, the same agency simply did not have the statutory authority to permit relitigation of the same facts under the same statute.

In *Saunders v. Shaw*, 244 U.S. 317 (1917), also cited by GSU, evidence on a particular subject was ruled to be inadmissible at trial, but the state supreme court's opinion on rehearing turned on that subject, which had been ruled outside the pleadings, thereby depriving a party of its chance to submit evidence it would otherwise have offered and had admitted in the first instance. Docket No. 7195 bears no resemblance to the *Saunders v. Shaw* case: the statistical evidence offered by GSU was admitted and fully considered, and GSU's appeal of the PUC's Final Order is pending. GSU does not have a constitutional right to have its evidence be more credible than it was.

GSU misleadingly argues that if it were afforded a second trial to prove the same facts, it would have to reconcile the amount of costs it failed to prove prudent

the first time with the amount it had proved prudent.[25] GSU characterizes this as an "altered standard." However, all that would occur if GSU were afforded a second trial, is that GSU would have to prove prudent the $1.45 billion in cost overruns which it had failed to prove prudent in Docket No. 7195. Therefore, what GSU's argument boils down to is that it should be allowed a second trial because it did not know in advance to what extent it would fail in the trial it received. This is preposterous because no party is entitled to a prediction or guarantee of its failure or success before it puts on its evidence.

Further, after the administrative trial in Docket No. 7195, GSU repeatedly disclaimed any need to adduce further evidence, arguing that it had made its best effort and proved the whole of the plant expenditures prudent. In response to the Examiners' Report, which severely criticized GSU's evidence and GSU's failure to explain huge cost overruns satisfactorily, GSU vigorously argued that another effort to try and reconcile the causes for the cost overruns would be a waste of money:

> No witness or party disputes the proposition that Gulf States could have spent millions of dollars to develop some sort of cost reconciliation study which might have the patina of completeness or accuracy. However, each witness who testified on the subject agreed that such a study would be no more accurate or convincing than what Gulf States had already presented. GSU's Exceptions to the Examiner's Report at 37.

GSU also denied any need for a remand from the Commissioners back to the Examiners to re-open the evidentiary record. Rather GSU insisted that it saw no need to do so because it had fully met its burden of proof as to the whole plant costs:

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[25] Since the plant was an indivisible expense item, the whole plant would have to be relitigated. There was no discrete part or parts of the plant identifiable with $1.45 billion.

> MR. AVERY:. . . . What I'm saying to you is, I'm not going to tell you anything but straight what we think. What we think is, a remand isn't necessary because we met our burden of proof. And I can't tell you that I don't think that if I do think that. GSU Counsel in Final Orders Meeting Tr. at 790.

Moreover, GSU made a trial strategy decision not to seek a remand to put on more evidence because it believed that it must succeed based on the evidence it had presented and that a disallowance could not be sustained on appeal:

> "We do not think that an order which disallowed everything over the definitive cost estimate has a shred of a chance of being sustained on appeal." GSU counsel in Final Orders Meeting Tr. at 780.

Thus, GSU was content to let its case rest.

GSU's "altered standard" argument is nothing more than a transparent attempt to disguise what was really a trial strategy decision that GSU may regret in hindsight. GSU's administrative appeal is now pending in state district court.

D. Other GSU Petition Misstatements

On page eleven of its petition GSU states that its motion for rehearing in the Texas Supreme Court reiterated that federal issues were present and had been left unaddressed. That statement is incorrect. As shown in part II of this brief in opposition, and from GSU's own appendix showings which are flawed on their face, GSU did not truly raise any of its issues here presented prior to its motion for rehearing in the Texas Supreme Court.

On page seven of its petition at note 10, GSU states that the two Commissioners remaining in office "could not agree on rehearing." Since GSU's Docket No. 7195 motion for rehearing at the PUC was silently overruled by operation of law, these respondents have not detected

from the record the foundation for GSU's assertion that the Commissioners did not agree. It seems questionable whether GSU can demonstrate the basis of its assertion. Moreover, if the implication is that GSU would have fared better if Chairman Thomas had also been able to consider its motion, that is clearly unknown by the parties.

On page sixteen of its petition GSU states that "the Texas Supreme Court's decision thus violates *Utah Construction*'s holding that only an agency decision actually resolving the issue before it may be given preclusive effect." First, *Utah Construction* did not so hold, and explicitly based its decision on "the agreement of the parties as modified by the Wunderlich Act."[26] 384 U.S. at 421. Second, GSU's rendition of *Utah Construction*'s discussion of "general principles" of collateral estoppel appears overbroad to cover both collateral estoppel and *res judicata*, even in the context of federal common law.[27] Additionally, the injunction against prudence relitigation and the Texas Supreme Court's opinion affirming it, are not inconsistent with *Utah Construction*. GSU repeats its mistakes in this regard in several other places in its petition, including page eighteen.

On page seventeen of its petition GSU misstates the Texas Supreme Court opinion to the effect that it only ruled that deferring a decision constitutes a disallowance. This misstatement is largely addressed in Part V of this brief in opposition, concerning GSU's burden of proof and the completeness of the PUC decision in Docket No. 7195.

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[26] On page 19 of its petition, GSU states that "Under *Utah Construction*, an adequate opportunity to litigate is an essential element of due process." In *Utah Construction* this Court made no holding or reference regarding due process as it may relate to *res judicata* and collateral estoppel.

[27] GSU's implication that the agency decision in Docket No. 7195 did not resolve the prudence issue is incorrect, as discussed in Part V.B of this brief in opposition.

VI. CONCLUSION

This Court has no jurisdiction to grant GSU's petition for writ of certiorari. The Texas Supreme Court did not expressly decide the questions presented, and the questions were not properly and timely presented. GSU's attempts at affirmative showings of proper preservation of federal questions are blatantly incomplete and flawed on their face. Additionally, no real and substantial federal question is presented and the state court decision rests on an adequate non-federal basis. Further, no review of the rates set in PUC Docket No. 7195 has even been completed by the Texas courts.

This Court may not grant the writ pursuant to its own Rule 10.1, requiring a special or important question, which is not present in this case. Even if this Court could exert discretionary jurisdiction, it should decline to do so in recognition of the principle of comity. Finally, GSU's petition is replete with misstatements of facts and law, several of which underlie GSU's petition questions.

WHEREFORE, PREMISES CONSIDERED, Respondents Coalition of Cities for Affordable Utility Rates and Office of Public Utility Counsel respectfully pray that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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